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United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) Case No. 07CR3190-JAH
11 Plaintiff,) DATE: March 10, 2008
12 v.) TIME: 8:30 a.m.
13 JOSE REYMUNDO) Honorable John A. Houston
14 CONTRERAS-HERNANDEZ,)
15 Defendant.) UNITED STATES' RESPONSE AND
16) OPPOSITION TO DEFENDANT'S
17) MOTION TO DISMISS THE
) INDICTMENT DUE TO AN INVALID
) DEPORTATION
)
) TOGETHER WITH STATEMENT OF
) FACTS AND MEMORANDUM OF
) POINTS AND AUTHORITIES
)

19 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and
20 through its counsel, Karen P. Hewitt, United States Attorney, and
21 Peter J. Mazza, Assistant U.S. Attorney, and hereby files its
22 Response and Opposition to Defendant's above-referenced motion in
23 the above-captioned case. Said Response is based upon the files
24 and records of this case together with the attached statement of
25 facts and memorandum of points and authorities.

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27	//
28	//

1 DATED: March 3, 2008.

2 Respectfully submitted,

3 KAREN P. HEWITT
4 United States Attorney

5 s/ Peter J. Mazza
6 PETER J. MAZZA
7 Assistant United States Attorney

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11 UNITED STATES OF AMERICA,)
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14 JOSE REYMONDO) UNITED STATES' STATEMENT OF
15 CONTRERAS-HERNANDEZ,) FACTS AND MEMORANDUM OF POINTS
Defendant.) AND AUTHORITIES

I

STATEMENT OF THE CASE

19 On November 23, 2007, a federal grand jury in the Southern
20 District of California returned a one-count Indictment charging
21 Jose Reymundo Contreras-Hernandez ("Defendant") with Deported
22 Alien Found in the United States, in violation of Title 8, United
23 States Code, Section 1326. The Indictment further alleged that
24 Defendant had been removed from the United States subsequent to
25 October 28, 2005.

26 //

II

STATEMENT OF FACTS

A. THE INSTANT OFFENSE

4 On October 27, 2007, United States Supervisory Border Patrol
5 Agent Mark E. Noland was conducting assigned patrol duties in the
6 Campo Border Patrol Stations area of operations. At approximately
7 3:00 a.m., Agent Noland responded to a seismic intrusion device
8 located on a trail known to be used by illegal aliens to further
9 their illegal entries into the United States. The seismic
10 intrusion device is located approximately nine miles east of the
11 Tecate, California Port of Entry and approximately 13 miles north
12 of the United States/Mexico international boundary.

Upon arriving at the location of the seismic intrusion device, Agent Noland observed fresh footprints headed in a north-bound direction. Agent Noland followed the footprints north until he came upon a group of ten individuals attempting to conceal themselves. Agent Noland identified himself as an United States Border Patrol agent. He then questioned each individual regarding their immigration status. All ten individuals, including Defendant, stated that they were citizens and nationals of Mexico without any documents to allow them to enter or remain in the United States legally. Defendant and the other nine individuals were taken into custody and transported to the Campo, California Border Patrol Station.

At the station, Defendant's personal information was entered into immigration and criminal history databases. Defendant's

1 identity was confirmed, along with his criminal and immigration
2 histories.

3 At approximately 3:00 p.m., Agents informed Defendant of his
4 Miranda rights. Defendant invoked those rights. No questions
5 were asked of Defendant.

6 **B. DEFENDANT'S IMMIGRATION HISTORY**

7 Defendant is a citizen of Mexico who was physically removed
8 from the United States through the San Ysidro, California Port of
9 Entry to Mexico on September 27, 2007.

10 **C. DEFENDANT'S CRIMINAL HISTORY**

11 Defendant was convicted of Solicitation to Commit Murder, in
12 violation of California Penal Code Section 653f(b) by a California
13 Superior Court in Santa Cruz, California on October 28, 2005. The
14 Superior Court sentenced Defendant to six years in prison.

15 **III**

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 Defendant seeks to collaterally attack his underlying
18 deportation. To do so, Defendant must show that 1) he exhausted
19 all his administrative remedies available to appeal his removal
20 order; 2) the underlying removal proceedings at which the order
21 was issued improperly deprived him of the opportunity for judicial
22 review; and 3) the entry of the order was fundamentally unfair.
23 Ubaldo-Figueroa, 364 F.3d 1042, 1048 (9th Cir. 2004). Such order
24 would be fundamentally unfair if Defendant's due process rights
25 were violated by defects in his underlying deportation proceeding,
26 and if he suffered prejudice as a result of those defects. Id.

1 A. **BECAUSE DEFENDANT WAS CONVICTED OF AN AGGRAVATED FELONY, HE**
 2 **CANNOT ESTABLISH THAT HE WAS PREJUDICED BY HIS REMOVAL**

3 In his motion to dismiss his Indictment, Defendant argues his
 4 2007 administrative removal was invalid for a variety of reasons.
 5 This Court need not reach all of these arguments, however, because
 6 Defendant cannot establish that he was in any way prejudiced by
 7 this removal, which Defendant must establish. See United States
 8 v. Corrales-Beltran, 192 F.3d 1311, 1316 (9th Cir. 1999).
 9 Prejudice can only be demonstrated if Defendant shows that he had
 10 plausible grounds for relief from deportation. United States v.
 11 Arce-Hernandez, 163 F.3d 559, 564 (9th Cir. 1998). Because
 12 Defendant had not plausible relief from deportation, his motion
 13 must fail.

14 Defendant is not eligible for "any relief from removal that
 15 the Attorney General may grant in the Attorney General's
 16 discretion." INA § 238(b)(5). He is an aggravated felon, which
 17 means he is conclusively presumed to be subject to removal and is
 18 ineligible for cancellation of removal, voluntary departure, and
 19 registration as a permanent resident alien. See United States v.
 20 Espinoza-Farlo, 34 F.3d 469, 471-472 (7th Cir. 1994). When we add
 21 to the obstacles imposed by virtue of that status the effect of 8
 22 U.S.C. § 1228(b)(5)'s exclusion of aliens removed under the
 23 expedited procedures from "any relief from removal that the
 24 Attorney General may grant in the Attorney General's discretion,"
 25 the absence of prejudice is deducible almost as a matter of law.
 26 See United States v. Garcia-Martinez, 228 F.3d 956, 963 (9th Cir.

1 2000) (holding that for alien convicted of aggravated felony and
 2 placed in expedited procedures under § 1228, removal is "foregone
 3 conclusion"); United States v. Benitez-Villafuerte, 186 F.3d 651,
 4 659 (5th Cir. 1999) (same).

5 Under 8 U.S.C. § 1227(a)(2)(A)(iii), any "alien who is
 6 convicted of an aggravated felony at any time after admission is
 7 deportable." No alien deportable as an aggravated felon under
 8 that section "shall be eligible for any relief from removal that
 9 the Attorney General may grant in the Attorney General's
 10 discretion." 8 U.S.C. § 1228(b)(5). There simply is no way for
 11 Defendant to establish any prejudice because he was not eligible
 12 for any relief from deportation. See Garcia- Martinez, 228 F.3d
 13 at 964 (finding that defendant needed to show actual prejudice
 14 rather than "assumed" prejudice, and that defendant could not do
 15 so because the official removing him had no discretionary
 16 authority to grant relief from deportation in light of defendant's
 17 prior rape conviction).

18 Defendant nonetheless argues that "solicitation to commit
 19 murder in and of itself is not a crime of violence." (Def.'s
 20 Mot. 5.) This is simply incorrect. Title 8, United States Code,
 21 Section 1101(a)(43)(F) defines an aggravated felony as "a crime of
 22 violence (as defined in section 16 of Title 18, but not including
 23 a purely political offense) for which the term of imprisonment
 24 [is] at least one year." Section 16 of Title 18 in turn defines a
 25 crime of violence as:

26 (a) an offense that has as an element the use,
 27 attempted use, or threatened use of physical force

1 against the person or property of another, or (b) any
2 other offense that is a felony and that, by its nature,
3 involves a substantial risk that physical force against
4 the person or property of another may be used in the
5 course of committing the offense.

6 18 U.S.C. § 16.

7 First, under California law, solicitation to commit murder is
8 a felony. See Cal. Penal Code § 653f(b) (statomg that any person
9 convicted under this statute is punishable by a term of
10 imprisonment of "three, six, or nine years"). Defendant's
11 sentence of six years means that his crime qualifies as a "a crime
12 of violence . . . for which the term of imprisonment [is] at least
13 one year" under 8 U.S.C. § 1101(a)(43)(F).

14 Second, looking to the "statutory definition of the prior
15 offense," Ye v. I.N.S., 214 F.3d 1128, 1133 (9th Cir. 2000),
16 Defendant's conviction for solicitation to commit murder as
17 defined in California Penal Code § 653f(b) qualifies as a crime of
18 violence under 18 U.S.C. § 16(b) because solicitation to commit
19 murder is a felony that involves a substantial risk of the use of
20 physical force. Several cases bear out this conclusion.

21 In Nq v. Attorney General of the United States, 436 F.3d 392
22 (3rd Cir. 2006), the defendant was convicted of three counts of
23 violating 18 U.S.C. § 1958, which proscribes the use of interstate
24 commerce facilities in the commission of a murder-for-hire. Nq,
25 436 F.3d at 394. The Third Circuit concluded that murder-for-hire
26 constituted a crime of violence under section 16(b) because the
27 statute categorically posed a substantial risk that physical force
28 will be used against another. Id. at 397. The court noted that

1 because it employed the Taylor categorical analysis it did not
 2 matter that Ng had contracted with a government informant who had
 3 no intent to carry out the murder. Id. The court stated that
 4 despite that "some violations of § 1958 will never culminate in an
 5 actual agreement or the commission of a murder does not alter our
 6 view that the natural consequence of . . . a murder-for-hire is
 7 that physical force will be used upon another." Id.

8 The Ninth Circuit similarly concluded that a conviction for
 9 solicitation to commit murder is a crime of violence for
 10 sentencing purposes under USSG § 4B1.2 in United States v. Cox, 74
 11 F.3d 189 (9th Cir. 1996). Section 4B1.2 defines a "crime of
 12 violence" as:

13 any offense under federal or state law punishable by
 14 imprisonment for a term exceeding one year that - (i) has
 15 as an element the use, attempted use, or threatened use
 16 of physical force against the person of another, or (ii)
 17 . . . otherwise involves conduct that presents a serious
 18 potential risk of physical injury to another.

19 USSG § 4B1.2(1). This language is not distinguishable from the
 20 definition of 18 U.S.C. § 16(b) in any material way, and to the
 21 extent that it is different, it is more narrow because section
 22 4B1.2(1)(ii) requires the "potential risk of physical *injury*"
 23 whereas section 16(b) only requires a "substantial risk that
 24 physical *force*" be employed. (Emphasis added). The Ninth Circuit
 25 reasoned that "[t]o ask someone to murder your wife for money
 26 involves a high degree of threat of physical force against one's
 27 wife." Cox, 74 F.3d at 190. See also United States v. Walker,
 28 181 F.3d 774 (6th Cir. 1999) (holding solicitation to commit

1 aggravated robbery is a crime of violence for sentencing
2 purposes).

As is demonstrated by the cases above, Defendant's conviction for solicitation to commit murder in violation of California Penal Code § 653f(b) is a crime of violence under section 16(b). California Penal Code § 653f(b) states: "Every person who, with the intent that the crime be committed, solicits another to commit or join in the commission of murder shall be punished in the state prison for three, six, or nine years." Cal. Penal Code § 653f(b). Even conceding - as Defendant argues - that the crime of solicitation to commit murder is completed as of the moment when the solicitation occurs, the crime would nonetheless involve a substantial risk that physical force will be used in the course of committing the offense. On this point, the Supreme Court's decision in Leocal v. Ashcroft, 543 U.S. 1, 10 (2004) is instructive. In Leocal, the Court discussed the meaning of section 16(b), explaining that the section:

18 covers offenses that naturally involve a person acting in
19 disregard of the risk that physical force might be used
20 against another in committing any offense. The reckless
21 disregard in § 16(b) relates not to the general conduct
or to the possibility that harm will result from a
person's conduct, but to the risk that the use of
physical force against another might be required in
committing a crime.

Leocal, 543 U.S. at 10. The Court cited burglary as the classical example of a crime that would qualify as a "crime of violence" under section 16(b) because "burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime." Id. Thus, like the burglar who

1 necessarily disregards the risk that he will be required to
 2 intentionally cause substantial risk to the home's occupants,
 3 Defendant necessarily disregarded the substantial risk attendant
 4 to his solicitation of murder that physical force would be
 5 necessary against the person of another "in committing the crime."

6 Nor is it of any relevance that Defendant here contracted
 7 with an undercover police officer to kill his ex-wife. (Def.'s
 8 Mot. 1.) As Nq explained, a categorical analysis of the statute
 9 at issue renders the underlying facts irrelevant. See Nq, 436
 10 F.3d at 397. The solicitation of a murder inherently involves the
 11 substantial risk of physical force being used in the course of
 12 committing an offense regardless of whether the crime solicited is
 13 ultimately carried out. Accordingly, Defendant's conviction for
 14 solicitation to commit the murder of his ex-wife is a crime of
 15 violence under 18 U.S.C. § 16(b), and thus an aggravated felony
 16 under 8 U.S.C. § 1101(a)(43)(F).^{1/}

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Importantly, Defendant cites no case to dispute
 22 this conclusion. While the Ninth Circuit has found that
 23 crimes regarding solicitation to possess narcotics do not
 24 qualify as aggravated felonies, see Leyva-Licea v. INS, 187
 25 F.3d 1147, 1150 (9 th Cir. 1996), those cases are
 26 inapposite. Whether a drug crime qualifies as an
 27 aggravated felony turns on whether it is punishable under
 the Controlled Substances Act. The Controlled Substances
 Act does not mention solicitation crimes, nor does it
 contain a catch-all provision that could be read to cover
 solicitation crimes. See Leyva-Licea, 187 F.3d at 1150.

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1 **B. ADMINISTRATIVE REMOVALS ARE ACCEPTABLE FORMS OF REMOVAL, AND
2 THE ADMINISTRATIVE REMOVAL OF DEFENDANT DID NOT VIOLATE HIS
DUE PROCESS RIGHTS**

3 Defendant also argues that he was prejudiced by a lack of
4 counsel at his administrative removal proceedings. However, the
5 Ninth Circuit has consistently and repeatedly upheld the validity
6 of expedited administrative removal proceedings where a defendant
7 is unrepresented. Simply put, Defendant cannot establish that he
8 was in any way prejudiced by his removal, and his motion should be
9 denied.

10 The Ninth Circuit has made clear that "the full panoply of .
11 . . procedural and substantive safeguards which are provided at a
12 criminal proceeding are not required at a deportation hearing."
13 United States v. Solano-Godines, 120 F.3d 927, 960-61 (9 th Cir.
14 1997). Therefore, there is no right to counsel at an
15 administrative removal hearing. Lara-Torres v. Ashcroft, 383 F.3d
16 968, 974 (9th Cir. 2004). Nonetheless, the Ninth Circuit has
17 repeatedly held that absent a showing of a due process violation
18 and prejudice, the Government may rely on a deportation pursuant
19 to a Final Administrative Removal Order in prosecuting a defendant
20 under 8 U.S.C. § 1326. United States v. Garcia-Martinez, 228 F.3d
21 956 (9th Cir. 2000). Aggravated felons are subject to expedited
22 administrative removal. See 8 U.S.C. § 1228(b); United States v.
23 Hernandez-Vermudez, 356 F.3d 1011, 1012 (9th Cir. 2004).
24 Proceedings under § 1228(b) are governed by 8 C.F.R. § 238.1.
25 Under § 238.1, removal proceedings commence when the alien is

1 served with the Notice of Intent in conformance with 8 C.F.R. §§
2 103.5a(a)(2) & 103.5a(c)(2). See 8 C.F.R. § 238.1(b)(2)(I).

3 Here, the Notice of Intent, (Def.'s Mot., Exh. C), included
4 notice to Defendant that he had the right to have counsel present
5 at his administrative hearing. Whether Defendant chose to avail
6 himself to counsel at his own cost was a decision purely his own.
7 Nothing was done by the Government to deny him representation at
8 his administrative hearing. Regardless, Defendant had no Sixth
9 Amendment right to have counsel present at his administrative
10 removal proceeding. Accordingly, Defendant's argument that he
11 suffered a due process violation is unavailing.

12 **C. EXHAUSTION**

13 Finally, in order to successfully collaterally attack a prior
14 removal order, a defendant must demonstrate that he exhausted his
15 administrative remedies. United States v. Camacho-Lopez, 450 F.3d
16 928, 930 (9th Cir 2006); see also 8 U.S.C. § 1326(d). However,
17 because Defendant was convicted of an aggravated felony, he had no
18 right to administrative review. 8 U.S.C. § 1252(a)(2)(C).
19 Therefore, because Defendant did not have any right to
20 administrative review, there is no way the deportation proceeding
21 improperly denied him of that right. See 8 U.S.C. § 1326(d)(2).

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IV

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Defendant's motion be denied.

DATED: March 3, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Peter J. Mazza
PETER J. MAZZA
Assistant United States Attorney

IT IS HEREBY CERTIFIED THAT:

I, PETER J. MAZZA, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of RESPONSE AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE INDICTMENT DUE TO AN INVALID DEPORTATION on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Candis L. Mitchell, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2008.

s/ Peter J. Mazza
PETER J. MAZZA